No. 93-826

Supreme Court, U.S.
FILED
DEC 20 1993
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IN THE

Supreme Court of the United States

OCTOBER TERM, 1993

BERMAN ENTERPRISES, INC.; GENERAL MARINE TRANSPORT CORPORATION; STANDARD MARINE SERVICES, INC.; JANE FRANK KRESCH, as Secretary of Berman Enterprises; EVELYN BERMAN FRANK, as Chief Executive Officer of General Marine Transport Corporation and as Officer of the other named corporations; and PETER M. FRANK, as President of General Marine Transport Corporation.

Petitioners,

—against—

THOMAS C. JORLING, in his individual capacity and in his official capacity as Commissioner of the New York State Department of Environmental Conservation; and Langdon Marsh, in his individual capacity and in his official capacity as Executive Deputy Commissioner of the New York State Department of Environmental Conservation.

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court below was correct in concluding that federal law does not preempt New York State from taking enforcement action under its statutes which are designed to protect the environment against harms such as oil spills?

2. Whether the court below was correct in concluding that abstention is appropriate under the *Burford* and *Pullman* doctrines, where the issues raised by petitioners turn on a complex state regulatory scheme governing the prevention of pollution in its waters which has never been reviewed by the state courts?

3. Whether the court below correctly applied the test in *Harlow v. Fitzgerald* with respect to qualified immunity in holding that respondents are protected from damage suits relating to administrative orders issued or upheld by them pursuant to state statutes and regulations which have never received judicial interpretation and therefore are not clearly established law?

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ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

Respondents, Thomas C. Jorling, Commissioner of the New York State Department of Environmental Conservation, and

Langdon Marsh, Executive Deputy Commissioner of the New York State Department of Environmental Conservation, respectfully submit this brief in opposition to the petition for certiorari. The petition should be denied because the circuit court correctly applied the decisions of this Court, the petition does not present a conflict among the courts of appeals, and does not raise an important federal question which should be settled by this Court.

STATEMENT OF THE CASE

Prior to October 18, 1990, the petitioners, Berman Enterprises and several related corporations and their officers, operated oil tanker barges, sludge barges, and other vessels in New York harbor. On September 27, 1990, one of their tanker barges, the Sarah Frank, sank in the Arthur Kill, spilling oil and sludge into New York waters. (Pet. App. A, p. 3a).[1] Even before the sinking of the Sarah Frank, Berman Enterprises and its related companies (hereinafter, "Berman") had a long history of environmental violations in the New York Harbor area. (Opp. App.[2] A, p. 11a-12a).[3] On October 18, 1990, Thomas Jorling, Commissioner of the New York State Department of Environmental Conservation ("DEC") issued a Summary

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[1] References to the Appendix to the Petition for Certiorari are cited as (Pet. App. ___, p. ___a).

[2] Petitioners failed to include either Commissioner Jorling's Summary Abatement Order or Deputy Commissioner Marsh's Decision and Order in the Appendix to their Petition as required by Rule 14 of the Rules of this Court. Respondents have therefore included those orders as well as New York's Navigation Law ("Nav.L.") Section 174 and 17 New York Code of Rules and Regulations ("N.Y.C.R.R.") Section 30.10, both of which are relevant to this case. References to these documents are cited as (Opp.App. ___, p. ___a).

[3] The district court noted in its opinion dismissing petitioners' action, "[t]estimony and court records indicated that plaintiffs had repeatedly illegally dumped waste materials, operated unlicensed vessels, and withheld material information in obtaining operating licenses." (Pet. App. B, p.18a).

Abatement Order pursuant to Environmental Conservation Law ("ECL") § 71-0301 and Navigation Law ("Nav.L.") § 174, which concluded that

> . . . continued operation of this fleet in New York waters is likely to result in additional unreported oil, toxic wastewater, or sewage sludge discharges . . . which would irreversibly or irreparably damage the natural resources of the marine district. These same facts and circumstances are likely to cause other petroleum-related explosions, constituting an imminent danger to the health and welfare of vessel crews and others who find themselves on the waters of the marine district, and rendering additional environmental harm likely. (Opp. App. A, p. 12).

The order 1) immediately suspended the petroleum facility licenses for 14 of the Berman barges, 2) required Berman to empty all cargo from its barges, and 3) ordered that the barges remain docked and not operate in the New York marine district. (Pet. App. A, p. 3a). Under the terms of the Summary Abatement Order, an administrative hearing was scheduled within 15 days as required by New York law to address the merits of the Order. (Pet. App. A, p. 4a).

That same month, Berman commenced a civil action in the United States District Court for the Southern District of New York, seeking a temporary restraining order and preliminary injunction, arguing that New York was preempted from issuing its Summary Abatement Order. *Berman v. Jorling*, 90 Civ. 6848 (JES) (SDNY). After a full evidentiary hearing, the court denied Berman's motion, concluding that New York was not preempted from enforcing its environmental laws and that Berman had no likelihood of success on the merits. (Pet. App. A, p. 4a).

The administrative hearing therefore proceeded and the administrative law judge, in a 59 page opinion based on one month of testimony, recommended that:

1) The 14 major-facility licenses that had been suspended be revoked;

2) The summary abatement order issued by Jorling be continued without modification;

3) Modifications proposed by the staff to allow for limited operation of the barges be rejected; and,

4) The summary abatement order not be broadened to incorporate four other barges owned by Berman because those barges were not named in the order, and the request to incorporate them was made after the evidentiary record was closed. (Pet. App. A, p. 5a).

The report of the administrative law judge was reviewed by Langdon Marsh, Executive Deputy Commissioner of DEC,[4] who issued the final Decision and Order on March 25, 1991. He found, *inter alia*, that over the previous eleven years the fourteen Berman vessels that were subject of the Summary Abatement Order had " '. . . compiled records of chronic noncompliance with state and federal regulations which are designed to protect the environment, public health and safety . . .' " (Pet. App. A, p. 6a) and confirmed the recommendations of the administrative law judge. (Pet. App. A, p. 7a).

In August 1991, with the Southern District action still pending, petitioners filed this case in the Eastern District of New York, again claiming the Summary Abatement Order was preempted by federal law, and challenging Marsh's order as well. The new case sought declaratory and injunctive relief and damages against Commissioner Jorling and Executive Deputy Commissioner Marsh for alleged substantive and procedural due process violations in connection with the Sum-

[4] As indicated in the opinion of the court below, the Commissioner of DEC recused himself from further participation in the case, (Pet. App. A., p. 5a), although contrary to petitioners' assertion, (Pet., p. 3) there is no evidence in the record indicating the reason for the Commissioner's withdrawal.

mary Abatement Order and final Decision and Order. The complaint also alleged that the orders violated the supremacy clause and were arbitrary and capricious and not based upon substantial evidence under state law. (Pet. App. A, p. 7a).

On November 6, 1991, the Southern District action was dismissed by stipulation of the parties.[5]

On May 19, 1992, United States District Judge Jack B. Weinstein dismissed the Eastern District case. On August 24, 1993, the United States Court of Appeals for the Second Circuit upheld Judge Weinstein's decision in its entirety. Without further discussion, the Court of Appeals adopted the District Court's conclusion, which was based on a lengthy examination of the preemption doctrine, that New York is not preempted from regulating the Berman barges in New York waters. (Pet. App. A, p. 3a). With respect to petitioners' damage claims, the Court of Appeals agreed with the District Court that insofar as the claims were really against the State of New York, they were barred by the Eleventh Amendment, (Pet. App. A, p. 8a-9a), and also agreed that even if the claims were against the officials in their personal capacity, the officials were entitled to qualified immunity. (Pet. App. A, p.11a-12a). The Court further held that abstention was appropriate under the doctrines established in both *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943) and *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941) and that the remaining questions involving state law could be pursued in the state courts.

[5] The Court of Appeals mistakenly stated that the Southern District action was discontinued seven days after the Southern District (Sprizzo, J.) denied Berman's motion for a preliminary injunction. (Pet. App. A, p. 4a). In fact, petitioners continued that case for a full year after Judge Sprizzo's decision, and for approximately three months after they filed this case in the Eastern District of New York. (Pet. App. B, p. 18a).

REASONS FOR DENYING THE WRIT

A. The Court Of Appeals Correctly Decided That New York State Is Not Preempted From Regulating Barges In The Waters Of The State.

This Court has held that "when a State's exercise of its police power is challenged under the Supremacy Clause, 'we start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress.' " *Ray v. Atlantic Richfield*, 435 U.S. 151, 157 (1978) (citations omitted). Federal law may, however, preempt state law in three circumstances.

First, Congress may preempt state law by an express statement of preemption. *Pacific Gas and Elec. v. State Energy Resources Conservation and Dev. Com'n*, 461 U.S. 190, 203 (1983). Second, even when not explicit, preemption can be implied where there is "a scheme of federal regulation . . . so pervasive as to make reasonable the inference that Congress left no room for the state to supplement it," because Congress intended to dominate the field. *Pacific Gas and Elec.*, 461 U.S. at 203 [quoting *Fidelity Federal Savings & Loan Ass'n v. de la Cuesta*, 458 U.S. 141, 153 (1982)]; *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947). Third, even where Congress does not intend to displace the states, state law may be preempted where compliance with both state and federal law is "a physical impossibility," *Pacific Gas and Elec.*, 461 U.S. at 204 [quoting *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132, 142-43 (1963)], or where "state law 'stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.' " *Pacific Gas and Elec.*, 461 U.S. at 204 [quoting *Hines v. Davidowitz*, 312 U.S. 52 (1941)]. Here none of the prerequisites for preemption are met.

Petitioners have not cited any statute which explicitly preempts New York from exercising its environmental authority in New York waters, because there is none. Nor is there any

direct conflict between federal and state law with respect to New York's environmental authority. Therefore the only potential remaining basis for preemption is that Congress intended to occupy the field. Relying on this Court's opinion in *Ray*, petitioners contend that Congress intended the Coast Guard to be the sole agency regulating the Berman vessels. Petitioners' reliance on *Ray* is misplaced. In *Ray*, which dealt with the constitutionality of Washington State laws governing the design, size, and movement of oil tankers which operate in Puget Sound, this Court distinguished between regulations governing the design and construction of vessels, which are controlled by the Coast Guard so that the Nation can "speak with one voice with respect to tanker design standards," 435 U.S. at 166, and state laws and regulations which protect the state's environment, which are not preempted by federal law. As this Court stated in *Ray*,

> We do not question in the slightest prior cases holding that enrolled and registered vessels must conform to "reasonable, nondiscriminatory conservation and environmental protection measures . . ." imposed by a State. *Douglas v. Seacoast Products, Inc.*, 431 U.S. 265 (1977), citing *Smith v. Maryland*, 18 How. 71 (1855); *Manchester v. Massachusetts*, 139 U.S. 240 (1891); and *Huron Portland Cement Co. v. Detroit*, 362 U.S. 440 (1960). Similarly, the mere fact that a vessel has been inspected and found to comply with the Secretary's vessel safety regulations does not prevent a State or city from enforcing local laws having other purposes, such as a local smoke abatement law. *Ibid.*

435 U.S. at 164. Thus in *Ray*, although this Court found some provisions of Washington law to be in direct conflict with federal law and invalidated them, it upheld other provisions of state law that did not directly conflict with federal law.

Here, neither the Summary Abatement Order nor the final Order purport to determine whether individual vessels meet Coast Guard minimum design and construction standards. Rather, both orders are concerned with the operation of the

vessels and their "adverse environmental impact in the New York Harbor area." (Opp. App. B, p. 1a). This is exactly the area Congress has explicitly preserved to state authority—regulation to prevent pollution of a state's waterways. If Congress had intended to preempt New York's Navigation and Environmental Conservation Laws it would most likely have done so in the Clean Water Act, 33 U.S.C. §§ 1251 *et seq.*, or the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701 *et seq.* To the contrary, both statutes expressly reserve the rights of the states to impose their own requirements and liabilities with respect to the discharge of oil or other pollution within the state. *See*, 33 U.S.C. § 1321(o)(2) and 33 U.S.C. § 2718(a)(1).

B. The Court Of Appeals' Decision Is Consistent With This Court's Decision in *Harlow v. Fitzgerald* And Does Not Conflict With The Decisions Of Other Courts Of Appeals.

In holding that both Commissioner Jorling and Executive Deputy Commissioner Marsh are protected with respect to their actions in issuing the Summary Abatement Order and final Order, the Court of Appeals simply applied well-established law. *Harlow v. Fitzgerald*, 457 U.S. 800 (1982).[6] In *Harlow*, this Court held that to penetrate the shield of immunity which protects government officials performing discretionary acts, a plaintiff must establish two things; first, that the government official had violated clearly established law, and second, that a reasonable person would have known that the law had been violated. *Harlow*, 457 U.S. at 818-19. Petitioners argue that the Court of Appeals applied *Harlow* incorrectly because it never discussed the reasonable person prong

[6] Respondents argued below that they were entitled to absolute immunity as well, since the functions for which they were sued were quasi-judicial or judicial in nature. *See*, *Harlow*, 457 U.S. at 810-11. The Court of Appeals did not reach the question of absolute immunity, since it concluded that respondents' acts were fully protected by qualified immunity.

of the test. Under *Harlow*, however, qualified immunity is not overcome unless both prongs of the test are satisfied. Having concluded that the first prong had not been met, *i.e.*, the issuance of the Summary Abatement Order and the final Order did not violate any clearly established law, it was therefore not necessary for the court to reach the second prong.[7]

Commissioner Jorling, according to the Court of Appeals, clearly had the authority under ECL § 71-0301 to issue a Summary Abatement Order without a prior hearing.[8] Executive Deputy Commissioner Marsh acted on the basis of a lengthy administrative hearing record. Both orders, according to the court, were at least superficially authorized by Section 174 of the Navigation Law and by 17 N.Y.C.R.R. § 30.10 governing vessel licensing and revocation. (Pet. App. A, p. 10a). Therefore, even if, as petitioners contend, Commissioner Jorling and Executive Deputy Commissioner Marsh went too far in the exercise of their authority, the Court of Appeals was

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[7] The Court of Appeals correctly concluded that the Summary Abatement Order and the revocation of vessel licenses were authorized pursuant to ECL § 71-0301; 6 N.Y.C.R.R. § 622.14(a); and Nav. L. § 174; 17 N.Y.C.R.R. § 30.10, respectively.

[8] ECL 71-0301 provides in part:

> Notwithstanding any inconsistent provisions of law, whenever the commissioner finds, after investigation, that any person is causing, engaging in or maintaining a condition or activity which, in his judgement, presents an imminent danger to the health or welfare of the people of the state or results in or is likely to result in irreversible or irreparable damage to natural resources, and relates to the prevention and abatement power of the commissioner and it therefore appears to be prejudicial to the interests of the people of the state to delay action until an opportunity for a hearing can be provided, the commissioner may *without prior hearing*, order such person by notice, in writing where practicable or in such other form as in the commissioner's judgment will reasonably notify such person whose practices are intended to be proscribed, to discontinue, abate or alleviate such condition or activity, and thereupon such person shall immediately discontinue, abate or alleviate such condition or activity. (emphasis supplied).

correct in concluding that "nothing the defendants did is expressly prohibited under state law." (Pet. App. A, p.10a). Moreover, as the Court of Appeals noted, those claims regarding respondents' exercise of their authority raise " 'unresolved and difficult questions of state law' of which 'the state courts have not had occasion to provide an authoritative interpretation' ". (Pet. App. A., p.10a-11a). Since no action of either official violated "clearly established law," it was not necessary for the Court of Appeals to reach the second prong of the *Harlow* test, and the court correctly concluded that respondents were entitled to qualified immunity.[9]

[9] The application of *Harlow* by the Court of Appeals is completely consistent with the cases petitioners cited in support of their claim that this Court's immunity test was misapplied. Those circuits did not, as petitioners claim, apply both prongs of the test in all circumstances. Only where they found a violation of clearly established law, did the courts go on to consider the question of reasonable knowledge. When the law allegedly violated was not clear, the defendant officials retained the protection of qualified immunity without any inquiry into their reasonable knowledge. So, in *Chapman v. Nichols*, 989 F.2d 393 (10th Cir. 1993) because the court found the law governing strip searches to be clearly established, it went on to consider whether an objectively reasonable officer could have believed his conduct to be legally acceptable. In *Walters v. Grossheim*, 990 F.2d 381 (8th Cir. 1993) *only* the question of reasonable knowledge was explored by the Court because the prison officials being sued had directly violated an unstayed judgment of a state court and therefore there was no question of whether the law was clearly established. Under the circumstances, the only question considered was whether a reasonably competent official should know that it is not lawful to disobey a final and nonappealable court order. 990 F.2d at 384. In contrast, in both *Cronen v. Texas Dept. of Human Services*, 977 F.2d 934 (5th Cir. 1992) and *Long v. Norris*, 929 F.2d 1111 (6th Cir. 1991), *cert. denied*, ____ U.S. ____, 112 S.Ct. 187 (1991), with respect to those causes of action where the courts held that no clearly established law had been violated, they did not consider the question of reasonable knowledge. For example, in *Cronen*, having found that denial of the plaintiff's claims for shelter cost deductions did not violate clearly established rights, the court upheld the grant of qualified immunity, stating "we express no opinion of the reasonableness of defendant's interpretation but hold only that neither of these regulations, nor any other authority, clearly establishes Cronen's right to the shelter cost

C. The Court of Appeals Properly Applied Both *Burford* and *Pullman* Abstention In Dismissing This Case.

1. *Burford* abstention

Under the doctrine established by this Court in *Burford v. Sun Oil Co.*, 319 U.S. 315 (1943), federal courts will abstain from interfering with specialized regulatory schemes, especially where the state law issues concern "problems of substantial public import whose importance transcends the result in the case then at bar." *Colorado River Water Conservation District v. U.S.*, 424 U.S. 800, 814 (1976), explaining *Burford* abstention.

The Court of Appeals was correct in concluding that *Burford* abstention requires the dismissal of this case, because as the court noted, Congress has given the states "considerable leeway in protecting the purity of their own waterway." (Pet. App. A, p. 13a). *See*, Federal Water Pollution Control Act, 33 U.S.C. § 1321(o)(2); Oil Pollution Act of 1990, 33 U.S.C. § 2718(a)(1). The State of New York has so acted to protect its waterways pursuant to its Navigation and Environmental Conservation Laws.

Petitioners argue, however, that *Burford* abstention is nonetheless inappropriate, claiming that neither the Summary Abatement Order nor the final Decision and Order alleged or found violations of state law by the Berman companies. In fact, both orders refer to specific violations of state law governing the discharge of oil. *See*, *inter alia*, Summary Abatement Order: failure to report oil spills to DEC as required by

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deductions." 977 F.2d at 940. With respect to income averaging, however, the court found a violation of a clearly established right, so it went on to consider reasonable knowledge. *Ibid. See also, Long*, where the Court of Appeals held that prison officials were protected by qualified immunity from the plaintiffs' cause of action based on free association of prisoners, without considering the question of reasonable knowledge, because the court found no such clearly established associational right. 929 F.2d at 1118.

Nav.L. § 175[10] (Opp. App. A., p. 3a); failure to report changes in design, construction, operation or maintenance of their barges as required by 17 N.Y.C.R.R. § 30.6(c) (Opp. App. A, p.5a); *See also, inter alia*, Decision and Order, chronic non-compliance with state and federal regulations designed to protect the environment and public health and safety (Opp. App. B, p. 18a); failure to report changes to the vessels' design, construction, operation or maintenance which would materially affect the potential for a petroleum discharge in violation of 17 N.Y.C.R.R. § 30.6(c)(3) (Opp. App. B, p. 23a); problems of compliance with state law after licenses were issued to the Berman vessels (Opp. App. B, p. 23a).

Petitioners' additional claim, that the Court below failed to identify ". . . any comprehensive scheme or settled administrative procedures that are relevant to this case," is equally mistaken. (Pet., p. 9). Citing only ECL § 71-0301 and § 3-0301, petitioners argue that these statutes are simple, and not part of a complex regulatory scheme requiring abstention. As the Court of Appeals recognized, however, the ECL provisions cited by petitioners are only one part of the statutory scheme established by the State Legislature to protect the environmental quality of New York's waterways. The Navigation Law and regulations promulgated pursuant thereto constitute the balance of the scheme.[11] It is just such a state

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[10] Releasing oil in New York waters is itself a violation of state law. Nav. L. § 173 and ECL § 17-0503.

[11] Petitioners have consistently and inexplicably ignored the Navigation Law provisions and regulations governing oil spill prevention and control pursuant to which the Summary Abatement Order and Decision and Order were issued, and failed to include them in their appendix of relevant statutes as required by Rule 14 of this Court. The Navigation Law and regulations are, however, a significant part of the statutory scheme which New York has developed to prevent pollution of its waterways.

regulatory scheme that *Burford* abstention was designed to protect.[12]

2. *Pullman* abstention

Under principles articulated by this Court in *Railroad Commission of Texas v. Pullman Co.*, 312 U.S. 496 (1941), federal courts will abstain

> when difficult and unsettled questions of state law must be resolved before a substantial federal constitutional question can be decided. By abstaining in such cases, federal courts will avoid both unnecessary adjudication of federal questions and "needless friction with state policies. . . ."

Hawaii Housing Authority v. Midkiff, 467 U.S. 229, 236 (1984), quoting *Pullman*, 312 U.S. at 500.

There are "three essential conditions" for invoking *Pullman* abstention: "(1) that the state statute be unclear or the issues of state law be uncertain, (2) that resolution of the federal issue depend upon the interpretation to be given to the state law, and (3) that the state law be susceptible of an interpretation that would avoid or modify the federal issue." *Winters v. Lavine*, 574 F.2d 46 (2d Cir. 1978), citing *McRedmond v. Wilson*, 533 F.2d 757, 761 (2d Cir. 1976).

The Court of Appeals noted in its discussion of the preemption issue that New York state courts have not yet interpreted the provisions of the ECL and Navigation Law pursuant to which the challenged orders were issued. (Pet. App. A, p.10a-11a). Those provisions, according to the court, are "a complex, even bewildering, system for regulating such matters as oil and sewage pollution." (Pet. App. B., p. 13a).

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[12] The District Court, in its discussion of *Burford* abstention, took judicial notice of both the huge amount of oil and oil related products transported in New York's waterways, and the many oil spills which occur each year in those waterways, threatening health, safety, and the environment. (Pet. App. B, p. 22a).

Furthermore, decisive issues in the case turn on the interpretation of those state laws and regulations, (*Ibid.*) and determination of those issues could avoid the necessity of a federal determination. (*Id.* at 12a). Therefore this case satisfies the conditions for *Pullman* abstention.

Nonetheless, petitioners contend that *Pullman* abstention is not appropriate because they have alleged civil rights violations, citing numerous cases for the proposition that abstention is disfavored in actions brought under 42 U.S.C. § 1983. Mere claims of general civil rights violations are not, however, sufficient to justify rejection of *Pullman* abstention. Moreover, petitioners have overstated the principle regarding civil rights cases on which they rely to oppose abstention and claimed differences among the circuits where none exist.

For example, petitioners cite *Mayor of City of Philadelphia v. Educational Equality League*, 415 U.S. 605 (1974) for the proposition that abstention is disfavored in all § 1983 cases. This Court's statement that ". . . abstention is not favored in an *equal protection*, civil rights case . . .," 415 U.S. at 628 (emphasis supplied), was, however, considerably narrower than the principle espoused by petitioners, and was made where the central issue before the court was whether there had been racial discrimination in violation of the Fourteenth Amendment, and where the state issue was "insubstantial" and had been abandoned by the parties. *Id.* at 629. [13]

Nor do the circuit court cases cited by petitioners actually demonstrate "differences" among the circuits in their appli-

[13] *Zwickler v. Koota*, 389 U.S. 241 (1967), also relied on by petitioners, is inapposite. It involved the appropriateness of enjoining a state criminal prosecution brought under a statute which was allegedly violative of the First Amendment. Notably, this Court indicated in *Zwickler* that *Pullman* abstention *is* appropriate where, as here, a state statute which has been challenged is susceptible of a construction by state courts which would avoid or modify the constitutional question.

cation of the principles of *Pullman* abstention.[14] In *Conover v. Montemuro*, 477 F.2d 1073 (3rd Cir. 1973), the Third Circuit did not, as petitioners claim, state that abstention was not warranted in § 1983 cases. (Pet., p. 11). Rather, the *Conover* court stated that prior resort to state courts was "not *required*" in an action brought under the Federal Civil Rights Act, that is, there is no doctrine of exhaustion of state remedies where federal court jurisdiction has been invoked pursuant to 28 U.S.C. § 1343. 477 F.2d at 1079 (emphasis supplied). Moreover, as the Third Circuit indicated, the district court in *Conover* did not even consider *Pullman* abstention, perhaps because no construction of state law would have avoided the constitutional claim. *Id.* at 1081.

Similarly, application of the principles of *Pullman* abstention in *Palmer v. Columbia Gas of Ohio, Inc.*, 479 F.2d 153 (6th Cir. 1973) are consistent with holdings of this Court and the ruling of the Second Circuit in this case. In *Palmer*, the court indicated that where the state remedy available to the plaintiffs was a purely discretionary one, it was not inappropriate for the district court to exercise its discretion to reject the use of the abstention doctrine.[15] 479 F.2d at 170. In *Canton v. Spokane School District #81*, 498 F.2d 840 (9th Cir. 1974), although the court, quoting the Second Circuit case of *Wright v. McMann*, 387 F.2d 519, 525 (2d Cir. 1967), stated that "cases involving vital questions of civil rights are the

[14] Furthermore, mere "differences" in the application of a legal principle to the facts of individual cases do not rise to the level of "conflict" in the circuits under Rule 10 of this Court.

[15] The other two Sixth Circuit cases relied on by petitioners are completely inapposite as no party even relied on the *Pullman* doctrine. *See, Hanna v. Toner*, 630 F.2d 442, 446 (6th Cir. 1980), *cert. denied*, 450 U.S. 919 (1981), and *Crawley v. Hamilton County Com'rs*, 744 F.2d 28 (6th Cir. 1984). Furthermore, in discussing cases which are particularly appropriate for federal, rather than state treatment, the courts were not discussing general civil rights cases as petitioners claim, but rather spoke of cases dealing with conditions of confinement in adult and juvenile detention facilities.

least likely candidates for abstention," 498 F.2d at 846, and rejected abstention, it did so only because there was no ". . . doubtful issue of state law which, if authoritatively resolved by the state courts, would dispose of the constitutional claims presented." *Ibid.* Here, by contrast, the orders challenged by petitioners turn on matters of state law which have never been addressed by the state courts. Thus, the ruling of the Second Circuit is completely consistent with the approaches of the Third, Sixth, and Ninth Circuits.

Petitioners' additional claim, that the decision by the Court of Appeals to dismiss this case based upon *Pullman* abstention creates a conflict with the decisions of this Court and those of other circuits, is also meritless. As the Court of Appeals recognized, although dismissal is not normally appropriate in the case of *Pullman* abstention, it was appropriate here because after the state courts act, no federal matters will remain to be heard by the federal courts. (Pet. App. A, p. 12a). To the extent that petitioners are seeking damages against Commissioner Jorling and Executive Deputy Commissioner Marsh, their claims are defeated by qualified immunity. (*Ibid.*). Petitioners' claims for declaratory and injunctive relief involve the authority of the commissioners to issue their respective orders, which turns on the interpretation of state law and regulations. If the state court determines that the commissioners acted within their authority, petitioners' constitutional claims would fail. If the state court holds that state authority had been exceeded, then petitioners would be able to obtain the declaratory and injunctive relief they seek in the state forum. In either case, no issues would remain for the federal courts. Therefore, dismissal was appropriate. (Pet. App. A, p.12a-13a).

Nor does application of the abstention doctrine deprive petitioners of their only avenue of redress as they claim in their conclusion. (Pet. p. 22). Review of administrative agency orders is available in state court pursuant to Article 78 of the Civil Practice Law and Rules ("CPLR"). Indeed, the Second Circuit explicitly warned petitioners that if they are

to avail themselves of those state procedures they must move promptly—"perhaps even before the mandate is issued from [the] Court." (Pet. App. A, p. 13a). Failure of petitioners to utilize available state court remedies does not, however, justify the rejection by the federal courts of the longstanding principles of abstention.

CONCLUSION

For all the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: New York, New York
December 20, 1993

Respectfully submitted,

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APPENDICES

APPENDIX A

SUMMARY ABATEMENT ORDER
DEC Case No.

STATE OF NEW YORK
DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the Alleged Violations of Article 17 of the New York State Environmental Conservation Law ("ECL"), Article 12 of the New York State Navigation Law ("NL"), and Titles 6 and 17 of the New York Codes, Rules and Regulations ("NYCRR")

—BY—

Berman Enterprises, Inc.
555 Madison Avenue
New York, N.Y. 10022,

General Marine Transport Corporation
1 Ingram Avenue
Bayonne, N.J. 07002,

Standard Marine Services, Inc.
1 Ingram Avenue
Bayonne, N.J. 07002,

Jane Frank Kresch, as Secretary of Berman Enterprises,

Evelyn Berman Frank, as Chief Executive Officer of General Marine Transport Corp. and an officer of the other named corporations,

Peter Frank, as President of General Marine Transport Corporation,

Respondents.

INTRODUCTION*

On September 27, 1990, the Tank Barge "SARAH FRANK" sank in shallow water at the First Marine Shipyard in the Arthur Kill, Staten Island. Although the U.S. Coast Guard had withdrawn the SARAH FRANK's Certificate of Inspection on August 8, 1989, rendering the vessel inoperable under New York State and Federal laws, the SARAH FRANK continued to haul petroleum products. Thus, when this vessel sank last month it spilled roughly 50,000 gallons of Number 2 Heating Oil into the fragile marine ecosystem of the Kill Van Kull.

The loss of the SARAH FRANK represents no isolated incident in the operating history of its owners, the named corporate respondents. Indeed, just this February, respondents lost the motorized vessel TUG EVELYN, spilling 5,000 or more gallons of diesel fuel upon the Staten Island shoreline. Respondents never reported this spill to the Coast Guard or to DEC.

Overall, these corporations, which own and/or operate at least 19 tank barges in New York waters, have compiled an unabated record of significant violations of federal and state laws designed to preserve minimum standards of care. At present, 8 of their 19 known tank barges lack Coast Guard certificates of inspection; 5 others have been cited by the Coast Guard for failure to complete required midterm inspections.

Respondents unlawfully failed to list these shortcomings when they applied to DEC for the petroleum-bearing vessel licenses which are required pursuant to the State Navigation Law. Additionally, respondents own/operate at least two barges which carry petroleum products and lack the necessary DEC licenses.

The operation of such chronically-underinspected barges has led to two separate fatal accidents due to petroleum explosions since 1980, and two more similar accidents in which fire seriously injured a member of the crew.

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* Appendices to the Summary Abatement Order have not been reprinted by respondents.

In the past seven years, these barges have been involved in three groundings, nine known oil spills, two collisions, and twenty one separate enforcement cases in which the Coast Guard assessed penalties for violations of federal regulations designed to assure vessel safety. Respondents also did not report the oil spills in question to DEC, as required by Navigation Law ("NL") Section 175.

Moreover, respondents have not only failed to maintain the tank barges in question, they have consciously operated them with the intent of violating applicable environmental laws and degrading the marine environment in order to decrease operating costs.

Specifically, respondents Evelyn Berman Frank and General Marine Transport Corporation recently offered criminal pleas of guilty in New Jersey Superior Court, admitting that they illegally directed several of the barges referred to above to discharge sewage sludge in the waters off Brooklyn, N.Y., and Newark, New Jersey. They then told the municipalities which had hired them to haul this noxious material that they had taken it, as promised, to the authorized dumping point 106 miles off the New York/New Jersey coast. Sentencing of respondents Frank and General Marine for these crimes is expected later this year.

Respondents also failed to pay civil penalties assessed by the Coast Guard for numerous separate violations of federal regulations in connection with their barge operations. This refusal forced the U.S. Attorney to commence a recovery proceeding to collect over twenty separate unpaid administrative judgments.

Finally, Standard Tank Cleaning Corporation, a related company which services the tank barges referred to above, was found liable in August 1990 for violating its New Jersey State wastewater discharge permit by discharging illegal concentrations of various pollutants. Standard Tank was then enjoined by the New Jersey Superior Court from continuing such polluting discharges.

* * * *

NOW, As Commissioner of the Department of Environmental Conservation, having reviewed respondents' unabated record of deliberately-illegal conduct and damage to human health and the natural environment, I make the following findings of fact and conclusions regarding the further operation of the barges listed on appendix 1 to this Order:

1. Respondent Berman Enterprises, Inc. ("Berman") is the owner of no fewer than 14 tank barges, which currently hold DEC operating licenses as specified in Appendix A. Respondent Jane Frank Kresch ("Kresch") is Berman's corporate Secretary. Upon information and belief, respondents General Marine Transport Corporation ("General") and Standard Marine Services, Inc. ("Standard") are corporate alter egos of Berman. General and Standard also own and/or operate certain additional tank barges listed in Appendix A, but not licensed by DEC. Respondents Evelyn Berman Frank ("Evelyn Frank") and Peter Frank are, respectively, Chief Executive Officer and President of General. Evelyn Frank is also an officer of Berman and Standard.

The Renewal of Respondents' Tank Barge Licenses

2. On or around December 13, 1989, Berman applied for renewal of licenses required, pursuant to NL Section 174, for the operation of all tank barges involved in the bulk storage and transfer of petroleum. These applications covered 14 vessels owned by Berman, which are listed by license number in Appendix 1.

3. A copy of each renewal application, signed by respondent Kresch on Berman's behalf, is annexed as collective Appendix 2. Every one of these fourteen applications states that the subject vessel has not been cited by the Coast Guard for any uncorrected violations of federal law or regulation. *Id.*

4. Based on the representations made by Kresch and Berman in the 14 applications in Appendix 2, DEC issued one-year renewal licenses to each vessel on March 23, 1990. A copy of each license is included in Appendix 3.

5. 17 NYCRR Section 30.6(c) states that, as a general condition of all such licenses, the operator shall promptly notify DEC of any changes in the "design, construction, operation or maintenance" of the facility in question. DEC has not received notice of any such change since the licenses were issued in March 1990, despite the fact that significant changes described in paragraphs 6 through 19 have occurred. In addition, respondents also own/operate at least two petroleum transfer barges without any valid DEC licenses (the BARGE 2010 and the LEO FRANK).

Federal Inspection Requirement Violations By Respondents' Vessels

6. Of the fourteen vessels licensed to respondents, and the five others DEC is aware respondents operate in New York waters, eight currently do not comply with federal law requiring certificates of inspection ("COI") (*see* 46 U.S.C. Section 3713(b)(3)). Five others have recently violated federal requirements that the owner perform a midterm inspection of the vessel, after it has been certified, to confirm its seaworthiness (*see* 46 U.S.C. 3308(1)).

7. Respondents turned in their COI for the JODIE K (DEC License # 0-0448) in December 1989 after that vessel suffered a transverse structural failure of its main cargo deck due to improper cargo loading by an unauthorized bargeman. These facts, and respondents' stated intention not to recertify the JODIE K, are attested to in the Coast Guard Inspection Report attached as Appendix 4.

8. The SARAH FRANK (DEC Lic. # 0-0449) lost its COI by expiration on August 8, 1989 (*see* Appendix 5), over one year before it sank and spilled tens of thousands of gallons of oil into the Kill Van Kull.

9. The LINDSEY FRANK II (DEC Lic. # 0-0658) lost its COI by expiration on September 19, 1990 (*see* Appendix 6). This vessel also suffered an explosion and fire on June 8,

1984, in which one crew member was burned to death. The Coast Guard found that, at the time of the explosion, the vessel was not properly ventilated (this was cited by the Coast Guard as a possible cause of the explosion), and was incidentally not properly manned and had missed a required drydock inspection. *See* Inspection Report at Appendix 7.

10. The NATHAN BERMAN (DEC Lic. #0-0696) lost its COI by expiration on January 15, 1989 (*see* Appendix 8), although inspection at the time of the SARAH FRANK sinking indicated it is still hauling petroleum products, despite respondent's statement to the Coast Guard that the vessel was product-free on May 11, 1990. *see* Inspection Report at Appendix 9, pages 2, 3.

11. The NEW ENGLAND 29 lost its COI by expiration on October 11, 1989. *see* Appendix 10.

12. The NEW YORK 30 will lose its COI by expiration on November 10, 1990 (*see* Appendix 11), and respondents have failed to seek recertification at least 30 days prior to expiration, as required by Coast Guard Regulation 46 C.F.R. Section 2.01-3. The Coast Guard also initiated an investigation against the NEW YORK 30 after it ran aground in April 1990. *Id.*

13. Upon information and belief, respondents also own and/or operate in New York waters three other tank barges that are neither licensed by DEC nor certified as seaworthy by the Coast Guard. These are the BARGE 2010, the REBECCA K., and the CYNTHIA M.

14. The BARGE 2010 lost its COI by expiration on April 19, 1990 (*see* Appendix 12). While the Inspection Report attached as Appendix L indicates serious structural problems were to be repaired before the BARGE 2010 was recertified, recent inspections made in connection with the loss of the SARAH FRANK indicate that the vessel is nevertheless currently loaded with petroleum, even though it was never recertified.

15. The REBECCA K., operated by Sludge Tank Cleaning Corporation, a company related to respondents, upon information and belief, by common management and ownership, lost its COI by expiration on December 6, 1986. *See* Appendix 13. Although the vessel was to be deactivated after its decertification (*id.*), upon operation and belief, it continues to operate.

16. The CYNTHIA M., owned by respondent General, lost its COI by expiration on June 21, 1990. *See* Appendix 14. Nonetheless, the New Jersey Attorney General's office discovered through surveillance that the CYNTHIA M. was still operating in 1987 and 1988, and was illegally discharging sewage sludge and acidic wastewater into New York and New Jersey territorial waters. General offered a plea of guilty in New Jersey Superior court to charges brought by the NJ Attorney General in connection with the Cynthia M.'s actions.

17. At least five other vessels owned and/or operated by respondents failed to satisfy Coast Guard requirements concerning midterm inspections for certified vessels (*see* 46 U.S.C. 3308(1)). These vessels are the JANE FRANK (DEC Lic. # 0-0451); the BUNKER NEW YORK (DEC Lic. # 0-0731); the PRINCESS B. (DEC Lic. # 0-0747); the PETER FRANK (DEC Lic. # 0-0749); and the ANNIE B. (DEC Lic. # 0-0750). *See* collective Appendix 15.

18. None of the five vessels referred to in the preceding paragraph has demonstrated to the Coast Guard that it has performed the required midterm inspection. Therefore, the current condition of these vessels is not documented according to Coast Guard Standards, and the vessels are currently violating federal requirements.

19. While no vessel can legally operate without a Coast Guard midterm inspection, several of the vessels referred to in the two preceding paragraphs have demonstrated a pattern of operating violations requiring especially close attention to inspection requirements. Most seriously, the PETER FRANK

experienced an accidental petroleum explosion in 1980, while it was uncertified, causing loss of a crew member's life. *See* collective Appendix 16. The BUNKER NEW YORK was issued numerous Coast Guard notices of operational non-compliance during 1987 and 1988 (*id.*); similarly, the Coast Guard found in 1986 that the JANE FRANK had several significant operating violations (*id.*).

Respondents' Disregard of DEC and Coast Guard Authority

20. While the Coast Guard has not yet had the time to prosecute fully many of the recent violations cited above, it assessed over $67,000 in penalties in twenty one separate cases brought against respondents based on federal violations occurring between 1984 and 1987.

21. Among these violations for which the Coast Guard imposed penalties are illegal discharge of petroleum into navigable waters by, among others, the ANNIE BERMAN (September 2, 1984–Jamaica Bay, N.Y.); the RICHARD K. (DEC Lic. # 0-0727) (February 26, 1985–Port Washington Harbor); the SARAH FRANK (July 23, 1986–Kill Van Kull); the PRINCESS B. (October 10, 1986–Arthur Kill); and, the JANE FRANK (November 28, 1986–Harlem River, and December 22, 1986–Hudson River). Copies of the applicable Coast Guard letters of assessment and Guard Commandant's denial of appeals are annexed as Appendix 17.

22. Respondents never notified DEC as to the existence of such spills, as they are required to do under NL Section 175 and 6 NYCRR Section 613.8. This failure is critical, as it hampers DEC's spill response and may lead to delays at a key stage of cleanup efforts.

23. As an example, on February 16, 1990, the motorized vessel TUG EVELYN sank at the First Marine Shipyard, spilling approximately 5,000 gallons of diesel fuel, presaging the larger spill to come in the case of the SARAH FRANK. The TUG EVELYN spill was never reported to the Coast

Guard or DEC, and was only discovered when federal investigators happened to inspect the First Marine Shipyard property in connection with an unrelated spill. This delay in notification caused a significant response delay, resulting in irreparable damage to the marine environment.

24. DEC brought administrative proceedings against First Marine Shipyard based on the illegal petroleum discharge and notification failure referred to in the proceeding paragraph. First Marine was later found by the Criminal Court of the City of New York to have violated such notice requirements and ordered to pay a $2,500 fine. *See* Appendix 18.

25. Returning to the pattern of operating violations involving the subject vessels: the Coast Guard also assessed penalties against respondents and their related corporate entities for more than twenty five different equipment failures, personnel deficiencies, record keeping errors and other violations of operating requirements designed to maintain the necessary standard of care. A list of these violations is annexed as Appendix 19.

26. Not only have respondents and their related business entities engaged in the long course of illegal conduct indicated by these violations and penalties, they have also illegally refused to pay the $67,000 in penalties involved. This latter refusal has required the Coast Guard to seek judicial intervention to collect these penalties. *See U.S.A. v. Standard Marine Transport Services, Inc., et al.* (U.S. District Court, S.D.N.Y., Complaint filed on or about August 30, 1990).

Respondents' Admitted Criminal Mishandling of Sewage & Wastewater

27. In 1989, General, Berman, Standard and Evelyn Frank, among others, were named in a twenty four count indictment (SGJ223-89-06(2)) handed down by the New Jersey State Grand Jury. The charges stemmed from the New Jersey State Attorney General's investigation of apparently illegal sewage

and wastewater dumping in New York and New Jersey waters by barges belonging to the corporate respondents in this proceeding.

28. Those named in the New Jersey indictment were said to have contracted to haul wastewater and digested sewage sludge generated in the bi-state area to treatment facilities or legal ocean dumping grounds some 106 miles off shore. Instead, General, Berman, Standard and Evelyn Frank allegedly dumped such cargoes, as a matter of course, into waters directly adjacent to land, such as the Kill Van Kull, Newark Bay, New York Harbor, *etc.* In several cases, the barge involved was alleged to have dumped its pollutant load without even leaving the area where it was docked!

29. General and Evelyn Berman recently signed an agreement (*see* Appendix 20) to plead guilty to the first and fourteenth count of the indictment, respectively (those relevant portions of the Indictment are annexed as Appendix 21). Thus, General admitted committing at least eighteen acts of illegal wastewater disposal in and around the New York Bight during 1987 and 1988 alone, to the severe detriment of the marine resources involved. Among the vessels from which such wastes were discharged were the LEO FRANK, the PRINCESS B, the CYNTHIA M. and the MORRIS J. BERMAN.

30. Evelyn Frank, General's Chief Executive Officer, pleaded guilty to one count of purposely and knowingly causing the unlawful discharge of hazardous wastes and toxic pollutants into the waters of Newark Bay, on or about December 10, 1988. *Id.*

31. As a final matter, the Civil Division of the New Jersey Attorney General's office recently obtained an injunction based on the illegal conduct of Standard Tank Cleaning Corporation, a company affiliated with those named herein through common ownership and control. Standard Tank Cleaning Corporation's business activities include cleaning

the holds of the barges referred to in this order, and discharging the wastewater byproduct of these operations into the receiving waters of the Kill Van Kull.

32. In a bench decision rendered on August 1, 1990, the New Jersey Superior Court found that Standard Tank's wastewater discharges violated the terms of its State discharge permits on 137 different occasions between May 1988 and April 1990. The Court then enjoined the corporation from committing such violations in the future. *See State of New Jersey Department of Environmental Protection v. Standard Tank Cleaning Corporation*, N.J. Super. Ct., Chancery Division - Hudson County (Slip Opinion 8/1/90).

33. Given the unbroken chain of environmental harms respondents have caused, their repeated oil spills and general disregard for the marine environment in which they function, the lack of adequate inspections for the vast majority of respondents' fleet, their failure to report oil spills to DEC at critical times, and their unending stream of citations by the Coast Guard for operating deficiencies, continued operation of this fleet in New York waters is likely to result in additional unreported oil, toxic wastewater or sewage sludge discharges such as those referred to above, which would irreversibly or irreparably damage the natural resources of the marine district.

34. These same facts and circumstances are likely to cause other petroleum-related explosions, constituting an imminent danger to the health and welfare of vessel crews and others who find themselves on the waters of the marine district, and rendering additional irreparable environmental harm likely.

* * * *

CONCLUSIONS

1. Respondents' barge hauling operations are tainted by a pervasive and unabated pattern of illegal conduct, which

extends to criminal mishandling of waste materials, wholesale operation of uncertified barges, disregard of Coast Guard enforcement orders including refusal to pay penalties levied therein, failure to license barges with DEC or report oil spills at critical junctures, and knowing misrepresentations and concealments of material facts in licensing proceedings before DEC.

2. Due to Respondents' disregard for environmental and admiralty laws, their barge hauling activities have been responsible for two petroleum explosions incidents involving loss of life and one other involving serious injury. These activities have also resulted in over ten recent oil spills—two this year alone including the loss of roughly 50,000 gallons or more from the SARAH FRANK, as well as the flagrant and knowing discharge of millions of gallons of toxic sludge and wastewater into the New York and New Jersey marine districts.

3. Based on the foregoing, continued operation of this fleet in New York waters is likely to result in additional unreported oil, toxic wastewater, or sewage sludge discharges such as those referred to above, which would irreversibly or irreparably damage the natural resources of the marine district. These same facts and circumstances are likely to cause other petroleum-related explosions, constituting an imminent danger to the health and welfare of vessel crews and others who find themselves on the waters of the marine district, and rendering additional irreparable environmental harm likely.

* * * *

NOW, THEREFORE, IT IS ORDERED THAT:

I. The licenses issued by DEC to the barges listed by number in Appendix 1 are hereby suspended, and will be subject to revocation if DEC staff meets its burden of proof, pursuant to 6 NYCRR 621.14, at the hearing scheduled in paragrapn V, below. This order shall constitute notice of intent to revoke, pursuant to 17 NYCRR Section 30.10.

II. Within seven days of the date this order is signed, respondents shall, in a legal and authorized manner, remove, store and/or dispose of all materials contained within any cargo holds, tanks or storage areas aboard the barges listed in Appendix A.

III. Once the barges listed in Appendix 1 have been emptied of product, they shall remain docked and shall not be operated in the New York Marine District.

IV. Respondents shall certify to DEC in writing that they have complied with the requirements of this order within 14 days of its date.

V. Respondents shall have the opportunity to be heard, pursuant to 6 NYCRR Section 620.3 and 17 NYCRR Section 30.10. Notice is hereby given that DEC will conduct a hearing for this purpose at its Region II Office, 47-40 21st Street, Long Island City, N.Y. 11101 on October 30, 1990, at 10 am.

VI. All communications to DEC pertaining to this Order shall be addressed to:

New York State Department of
Environmental Conservation
47-40 21st Street
Long Island City, N.Y. 11101
Att: Paul A. Gallay, Esq.
(tel. 718-482-4965)

Dated: Long Island City, N.Y.
October 18, 1990

Thomas C. Jorling
Commissioner, New York State
Department of Envir. Conserv.

To: Service list attached

APPENDIX B

DECISION AND ORDER
R2-3291-90-11

STATE OF NEW YORK: DEPARTMENT OF ENVIRONMENTAL CONSERVATION

In the Matter of the alleged Violations of Article 17 of the New York State Department of Environmental Conservation Law ("ECL"), Article 12 of the New York State Navigation Law ("NL"), and Title 6 and 17 of the New York Codes, Rules and Regulations ("NYCRR") by:

Berman Enterprises, Inc.
555 Madison Avenue
New York, New York 10022

General Marine Transport Corporation

—and—

Standard Marine Services, Inc.
1 Ingham Avenue
Bayonne, New Jersey 07002

Jane Frank Kresch, as Secretary of Berman Enterprises

Evelyn Berman Frank, as Chief Executive Officer of General Marine Transport Corp. and an officer of the other named Corporations, and

Peter Frank, as President of General Marine Transport Corporation

Respondents.

The issue presented in this case with respect to the summary abatement relief is one that has not been previously addressed. Simply stated, the question is whether the summary abatement threshold is reached because of the alleged problems with the management Respondents exercise over the vessels that are the subject of this action as demonstrated by the history of past compliance problems and other incidents that have resulted in adverse environmental impacts in the New York harbor area. It is worth noting however that issues addressing the compliance history and suitability of other persons subject to the Department's jurisdiction have been addressed in prior Department proceeding albeit in different procedural contexts.

Review of the Applicable Law

The summary abatement statute (ECL § 71-0301) requires a finding that there is a condition or activity which presents an imminent danger to the health or welfare of the people of the State or results in or is likely to result in irreversible or irreparable damage to natural resources, and relates to the prevention and abatement powers of the Commissioner. In this instance, given the broad powers of the Commissioner to prevent water pollution, and to protect wildlife and coastal resources (see ECL Articles 3, 11, 13, 15, 17, 25, 34, 71) there can be no doubt that the matters at issue relate to his prevention and abatement. The only question therefore, is whether the complained of condition or activity meets the other requirements of the statute.

The summary abatement provision of the ECL is mandated by the provisions of the Clean Air Act which require states to include as part of any approvable state implementation plan, authority comparable to 42 USC §-7603 (see 42 USC § 7410(a)(2)(F)(v) and McKinney's Consolidated Laws, ECL § 71-0301 Practice Commentaries). The Clean Air Act provision provides authority for, among other things, the use of injunctive relief where sources of pollution are presenting imminent and substantial endangerment to the health of per-

sons (42 USC § 7603). Since the adoption of this provision in the Clean Air Act, other federal environmental statutes that have been adopted contain similar emergency provisions and extend the availability of such relief beyond situations where public health is involved to instances where the endangerment is to the environment or public welfare (33 USC § 1364, Federal Water Pollution Control Act; 42 USC § 6973, Resource Conservation and Recovery Act; 42 USC § 9606, Comprehensive Environmental Response and Compensation Act). Furthermore, I note that the term "public welfare" has been held to be exceptionally broad, encompassing health and safety, recreational, aesthetic environmental and economic interests (*City of El Paso v. Reynolds*, 597 F. Supp. 691,700 (D.N.M. 1984)).

All of these emergency provisions have the common element of requiring a showing of imminent and substantial endangerment. While the summary abatement provision of the ECL does not have a well developed body of case law associated with it, the federal statute on which it is based and other comparable federal statutes have developed such a body of case law. This case law directly addresses the issue of what is required for a showing of imminent and substantial endangerment and therefore is appropriately relied upon in this Decision.

It is a well established principle that the use of the term "endangerment" in the above referenced federal statutes (or the comparable use of the term "danger" in ECL § 71-0301) is not restricted to situations where an actual harm exists but encompasses threatened or potential harms (*Reserve Mining Company v. Environmental Protection Agency*, 514 F.2d 492, 528 (8th Cir. 1975)). Because endangerments entails only a threat of harm, these provisions have been applied where there is only a risk of harm, (*United States v. Price*, 688 F.2d 204, 211 (3d Cir. 1982)). It has also been held that it is not necessary to quantify the harm or risk of harm (*U.S. v. Conservation Chemical Co.*, 24 ERC 1008 (W.D. Mo. 1985)).

By way of examining the question of what constitutes "imminence", the Courts have opined that the danger need not be immediate (*United States v. Waste Industries*, 734 F.2d 159, 165 (4th Cir. 1984); *United States v. Reilly Tar and Chemical Corp.*, 546 F. Supp. 1100 (D.Minn. 1982)). It has been held that an endangerment is "imminent" if factors giving rise to it are present, even though the harm may not be realized for years (*U.S. v. Conservation Chemical Co., supra* at 1030).

Whenever the courts have interpreted these statutes, they have acknowledged the need to factor into the decision both the nature of the endangerment which may be presented and its likelihood, recognizing that risk may be "assessed from suspected, but not completely substantiated relationships between facts, from trends among facts, from theoretical projections, from imperfect data, or from probative preliminary data not yet certifiable as fact", (*United States v. Vertac Chemical Corp.*, 489 F. Supp. 870, 885 (E.D. Ark., W.D. 1980), citing *Ethyl Chemical Corporation v. Environmental Protection Agency*, 541 F.2d 1 (D.C. Cir. 1976)). However, in recognition of the intent of these statutes to protect human health and the environment, the courts have recognized the need to liberally construe them in order to accomplish and maximize their benefits (*U.S. v. Conservation Chemical Co., supra* at 1029). And finally, the courts have emphasized the need to err in favor of protecting the public health, welfare and the environment when making any determination thereunder (*Id.* at 1031). To some extent this philosophy has been codified into the regulations governing the summary abatement provision which place the burden of proof on the responding party to prove that the complained of condition or activity does not come within the provisions of the statute (6 NYCRR 620.3(b)).

Review of the Facts

The record reveals that Respondents operate roughly thirty vessels in the New York Harbor area. These vessels include

oil barges, sludge barges and tugs. While there are a number of corporations that are involved in the ownership and operation of these vessels, there is substantial evidence in the record which demonstrates that the corporations are acting under the common management of the Berman and Frank families. In fact, Respondent's witness Sommers referred to all of the vessels as being, "under the care of Berman industries." Further Respondents have not sought to draw any distinctions between the management for any of the vessels that are the subject of the Summary Abatement Order.

Over the past eleven years, these vessels have compiled records of chronic non-compliance with state and federal regulations which are designed to protect the environment, public health and safety. As discussed further in the Hearing Report, while preclusionary effect has not been given to the various citations from the Coast Guard, these citations have been treated as relevant evidence concerning the circumstances of these events. It is the Respondents' failure to present any evidence which contradicts the citations concerning these incidents that compels the finding that they are indeed responsible for the offenses that were charged.

Many of the violations have been relatively minor and have involved record keeping or administrative requirements. Others have been more significant and have gone directly to the ability of the vessel to operate safely. Some have been accompanied by serious injury or loss of life or environmental damage. In still other circumstances, there were incidents documented which resulted in the pollution of New York harbor although no violation of law was cited.

Some of the violations and pollution incidents were shown to be the direct result of a failure to properly manage the vessels for which Respondent are directly responsible. The Respondents also bear responsibility for incidents attributable to the negligent acts of their employees on the well established legal doctrine of *respondent superior*. Under this doctrine the Respondents are responsible for the acts of their employees regardless of whether those acts were negligent so

long as the employee was acting the scope of his or her employment (52 NY Jur. 2d, Employment Relations § 334). While the record does not reflect a cause for all the alleged violations or pollution incidents, I note that there are no incidents that are fully explained by acts of God or other circumstances where the happening was affirmatively shown to be beyond the reasonable control of the Respondents. The sheer number of violations and pollution incidents and their duration for over a period of eleven years is also itself noteworthy.

Despite all of the problems that Respondents have had with the operation of their vessels over the last eleven years, the record contains no information on any efforts they undertook to implement programs of preventive maintenance or inspections, improve management or otherwise address the cause of these problems. Nor is there any explanation as to why the Respondents experienced such difficulty in complying with the Coast Guard's safety regulations, compliance with which must be considered presumptively as reasonably achievable.

Based on this record, I can only conclude that the continued operation of these vessels by the Respondents carries with it a substantial risk that these and other incidents will reoccur. The nature of the business Respondents are engaged in and a simple survey of the incidents caused by the operation of their vessels in the past demonstrate the potential for creating serious environmental and safety hazards. There is no confidence that the continuation of the pattern of conduct exhibited by Respondents will not result in the recurrence of prior problems and perhaps in even more serious incidents. While Respondents indicate that they are prepared to improve the performance of their operation by accepting the recommendations of their consultant, the fact that their operation has not improved, and, in fact, has worsened over the past eleven years suggests that it would be imprudent to place any faith in such a promise.

Respondents argue that we are required to ignore their prior course of conduct in reaching conclusions on the likelihood of

continued transgressions in the future. The authority they cite for this proposition is flawed however. While there may be limitations on the reliance on habitual conduct or a prior course of conduct to prove the occurrence of a particular act, the staff is not trying to prove particular acts but rather the likelihood that Respondents' conduct will create a threat to the public health or welfare or the environment in the future. For that purpose prior conduct is not merely an allowable indicator, it is one of the best and even those cases cited by Respondents acknowledge the appropriateness of the use of such information for these purposes (*Halloran v. Virginia Chemicals, Inc.*, 41 N.Y. 2d 386 (1977)).

Respondents also argue that the State should defer to determinations of the Coast Guard which is the chief regulatory agency involved in marine safety. The Respondents fail to understand, however, that the Staff have not taken issue with the Coast Guard determinations concerning the seaworthiness of any of their vessels. Even seaworthy vessels represent an unacceptable risk when those in charge of their operation fail to follow regulations designed to protect health, safety and the environment.

Conclusion on Summary Abatement Issue

Marshaling the facts in the context of the law demonstrates that there is a sound basis for continuing the Order. Respondent bear the burden of proof and they have not even approached demonstrating that operation of their fleet of barges would not constitute an imminent danger to public welfare.

The evidence shows conclusively that the continued operation of the fleet of vessels by these Respondents carries with it a serious risk of harm. That harm is imminent as the factors given rise to the harm, *i.e.*, the type of management afforded by the Respondents, is now present. The harm itself is potentially quite serious, witness prior incidents where crewmen were killed and where the sinking of Respondents vessels

caused substantial oil spills in the highly sensitive environment of New York harbor.

The forced retirement of Evelyn Berman does not alter these conclusions at all. While she may have been chiefly responsible for the short dumping of sewage sludge, the problems that have plagued Respondents vessels go far beyond that incident. As discussed above and in the Hearing Report, this array of problems cannot be attributed to any one individual or company but is a function of management of the these [*sic*] Respondents and the Berman and Frank business enterprise more generally.

Proposed Modification

Staff have agreed by letter to modify the original order in order to allow certain of the sludge barges to operate. They apparently are convinced that these barges are needed to support a disposal effort from several New Jersey communities and that the consequences of the failure to operate the barges exceeds the risk posed by their operation under current management. Additionally, Respondents argue that the continued operation of their sludge barges is also justified since those barges are under additional stringent regulatory controls imposed by the Coast Guard.

It should be noted that, unless there is an specific delegation, Staff has no authority to modify a summary abatement order of the Commissioner (*In the Matter of Allegro Oil and Gas*, Decision and Order of the Commissioner, October 20, 1988). In the context of this proceeding, the action is therefore being treated as a request to modify the Order.

While the circumstances cited by the Staff might support a public policy decision to allow the sludge barges to continue to operate, the record would need to demonstrate that there was no reasonable alternative to the use of Respondents barges. This record does not make a sufficient showing on this point. Respondents argument in support of the modification is specifically rejected since any regulatory controls, regardless of how foolproof they may appear, may be under-

mined through the type of management exhibited by the Respondents.

While as a practical matter it is recognized that the time period during which the barges were to be allowed to operate has expired, should circumstances change, an application to reinstitute the operating authority of the barges would be reconsidered upon a showing that the disposal authorities in New Jersey have no reasonable alternative.

I also note that another exception was made on the basis of public need for the operation of the Jane Frank. I find, similarly, that this record does not demonstrate that the use of this barge was the only available alternative under these circumstances.

License Revocation

Given the determination to maintain the summary abatement order in effect into the indefinite future, the issue of whether to revoke Respondent Berman Enterprises, major facility licenses may be rendered moot. However, for completeness' sake the following discussion is included.

The regulations promulgated under the Navigation Law contain limited grounds for revoking licenses (17 NYCRR 30.10(b)). The Staff requests revocation on the basis that the Respondents have not complied with the terms of their licenses. They further maintain that there are additional grounds to revoke these licenses based upon the circumstances offered as justification for the summary abatement order, *i.e.*, that the prior history associated with the Respondents demonstrates that they cannot reliably operate the licensed vessels. This latter ground is not explicitly stated in the Navigation Law and its implementing regulations.

The controversy surrounding the first ground relates to whether the Respondents reported those changes to their vessels design, construction, operation or maintenance which would materially affect the potential for a petroleum discharge (17 NYCRR 30.6(c)(3)).

The failure to report as relates to certain vessels was adequately established on the record. The general condition of the license clearly requires the reporting of vessels that sink (the Sarah Frank and the Princess B), suffer significant structural damage (the Jodie K) and have serious maintenance deficiencies (tne Nathan B). I do not find, however, that the general condition unambiguously requires reporting of any order or citation of the Coast Guard *per se*. This is particularly true where the order or citation arises out of the failure to comply with an administrative requirement (*e.g.*, failure to have had an inspection) which is not associated with a change in design, construction or operation and maintenance of the vessel itself.

The revocation of these licenses on the second and alternative ground cited by Staff is, however, adequately justified. The Department has previously held that in issuing licenses under the ECL, there is implicit authority to consider a person's past compliance history and general fitness of the applicant (*In the Matter of American Transfer Company*, Interim Decision of the Commissioner, February 4, 1991). We have also held that there is no basis, either in law or public policy, to distinguish between criteria used to grant a permit and criteria used to revoke a permit (*Id.*). If, subsequent to the issuance of a license, information unavailable at the time of the license issuance demonstrates that the licensee no longer meets the licensing criteria, there is authority to revoke the license. Such is the case here.

Although there were significant problems with Respondents' operation prior to the issuance of the most recent licenses, the compliance problems which Respondents have had since then, as detailed in the Hearing Report, demonstrate convincingly that their continued operation of the barges represents a menace to the New York harbor environment. These problems when added to and taken in the context of prior compliance problems are significant enough to now warrant revisiting and revising the decision to issue their major facility licenses.

NOW THEREFORE HAVING CONSIDERED

I. The Summary Abatement Order dated October 18, 1990 is hereby confirmed in whole and extended.

II. No modification to such Order is granted.

III. The revocation of the major facility licenses granted to Respondents set for [*sic*] in the Order of October 18, 1990 is confirmed.

IV. Staff are delegated the authority to modify this order upon the showing set forth above in this Decision.

V. All communications between Respondents and the Department concerning this Order shall be made to the Department's Region 2 Director, 47-40 21st Street, Long Island City, New York 11101.

VI. The provisions, terms and conditions of the Order shall bind Respondents, their agents, servants, employees, successors and assigns, and all persons, firms and corporations acting for or on behalf of the Respondents.

NEW YORK STATE DEPARTMENT OF
ENVIRONMENTAL CONSERVATION
LANGDON MARSH, EXECUTIVE
DEPUTY COMMISSIONER

Dated: Albany, New York
March 25, 1991

TO: Berman Enterprises, Inc.
555 Madison Avenue
New York, New York 10022

General Marine Transport Corporation &
Standard Marine Services, Inc.
1 Ingham Avenue
Bayonne, New Jersey 07002

APPENDIX C

NAVIGATION LAW

§ 174. Licenses

1. No person shall operate or cause to be operated a major facility as defined in this article without (a) a license issued by the commissioner, (b) without paying a license fee if such fee is required by the administrator, pursuant to the provisions of paragraph (a) of subdivision four of this section, and (c) without paying the surcharge established by paragraph (b) of subdivision four of this section.

2. Licenses shall be issued on an annual basis and shall expire on March thirty-first annually, subject to such terms and conditions as the department may determine are necessary to carry out the purposes of this article.

3. As a condition precedent to the issuance or renewal of a license the department shall require satisfactory evidence that the applicant has implemented or is in the process of implementing state and federal plans and regulations for control of discharges of petroleum, and the containment and removal thereof when a discharge occurs.

4. (a) The license fee shall be one cent per barrel transferred until the balance in such account established by paragraph (a) of subdivision two of section one hundred seventy-nine of this article equals or exceeds twenty-five million dollars, provided, however, that the fee on any barrel, including any products derived therefrom, subject to multiple transfer, shall be imposed only once at the point of first transfer. In each fiscal year following any year in which the balance of such account equals or exceeds twenty-five millon dollars, no license fee shall be imposed unless (a) the current balance in such account is less than twenty million dollars or (b) pending claims against such account exceed fifty percent of the existing balance of such account. The provisions of the

foregoing notwithstanding, should claims paid from such account not exceed five million dollars within three years after the license fee is first imposed, the license fee shall be one cent per barrel transferred until the balance in such account equals or exceeds eighteen million dollars, and thereafter shall not be imposed unless: (1) the current balance in such account is less than fifteen million dollars or (2) pending claims against such account exceed fifty percent of the existing balance of such account. In the event of either such occurrence and upon certification thereof by the state comptroller, the administrator shall within ten days of the date of such certification reimpose the license fee, which shall take effect on the first day of the month following such relevy. In the event of a major discharge or series of discharges resulting in claims against such account exceeding the existing balance of such account, the license fee shall be imposed at the rate of four cents per barrel transferred until the balance in such account equals pending claims against such account; provided, however, that the rate may be set at less than four cents per barrel transferred if the administrator determines that the revenue produced by such lower rate shall be sufficient to pay outstanding claims against such account within one year of such imposition of the license fee. Should such account exceed eighteen million dollars or twenty-five million dollars, as herein provided, as a result of interest, the administrator and the commissioner of environmental conservation shall report to the legislature and the governor concerning the options for the use of such interest.

(b) The surcharge on the license fee shall be two and one-half cents per barrel for each barrel transferred on or after June first, nineteen hundred eighty-five but before February first, nineteen hundred eighty-eight. Such surcharge shall be three and one-half cents per barrel for each barrel transferred on or after February first, nineteen hundred eighty-eight, but before February first, nineteen hundred ninety. Such surcharge shall be four and one-quarter cents per barrel for each

barrel transferred on or after February first, nineteen hundred ninety.

(c) The surcharge established by paragraph (b) of this subdivision shall continue to be paid despite the fact that the license fee imposed pursuant to paragraph (a) of this subdivision may, pursuant to said paragraph, no longer be imposed.

5. Every licensee shall on or before the twentieth day of the month following the close of each license fee period certify to the commissioner on such forms as may be prescribed by the commissioner the number of barrels of petroleum transferred to the licensee's major facility during the license fee period and at the same time shall pay the full amount of the license fee and surcharge due except that no licensee shall be required to make such payment until the cumulative amount due equals or exceeds one hundred dollars. Any licensee whose cumulative license fee or surcharge does not equal or exceed one hundred dollars annually shall pay the total amount due on or before the twentieth day following the expiration date of the license issued pursuant to this section.

6. If a certificate required by this section is not filed, or if a certificate when filed is incorrect or insufficient in the opinion of the commissioner, the amount of license fee or surcharge due shall be determined by the commissioner from such information as may be available. Notice of such determination, and notice of licensee's right to appeal such determination, shall be given to the licensee liable for the payment of the license fee or surcharge. Such determination shall finally and irrevocably fix the fee or surcharge unless the person against whom it is assessed, within thirty days after receiving notice of such determination, shall apply to the commissioner for a hearing, or unless the commissioner on his own motion shall redetermine the same. After such hearing the commissioner shall give notice of his determination to the person to whom the license fee or surcharge is assessed.

7. Any licensee failing to file a certificate, failing to pay a license fee or surcharge, or filing or causing to be filed, a certificate which is willfully false, or failing to keep any records required by this article or rules and regulations adopted hereunder, shall, in addition to any other penalties herein or otherwise provided, be subject to a fine not to exceed two times the annual license fee or surcharge, as determined by the commissioner.

8. Within three months of the effective date of this article every owner or operator of a major facility shall obtain a license. The department shall issue a license upon the showing that such registrant can provide necessary equipment to prevent, contain and remove discharges of petroleum.

9. On or after a date to be determined by the commissioner, but in no case later than ninety days after the effective date of this article, no person shall operate or cause to be operated any major facility without a major facility license issued by the commissioner. No license shall be valid for more than one year. Each applicant for a major facility license shall submit information, in a form satisfactory to the commissioner, describing the following:

(a) The number of barrels or another measurement of the storage capacity of the facility;

(b) Average daily throughput of the facility;

(c) A primary and contingency cleanup and removal plan which includes, but is not limited to, an inventory of:

(i) The storage and transfer capacity of the facility;

(ii) The containment and removal equipment, including, but not limited to, vehicles, vessels, pumps, skimmers, booms, chemicals, and communication devices to which the facility has access through direct ownership or by contract or membership in a discharge cleanup organization recognized

by the departments of environmental conservation and transportation as well as the time lapse following a discharge which precedes such access;

(iii) The trained personnel which are required and available to operate such containment and removal equipment and the time lapse following a discharge which precedes such availability;

(iv) All equipment and trained personnel used or employed in a capacity at the facility to prevent discharges of petroleum;

(v) The terms of agreement and operation plan of any discharge cleanup organization to which the owner or operator of the facility belongs;

(vi) The type and amount of petroleum transferred, refined, processed or stored at the facility;

(d) The steps taken to insure prevention of a discharge;

10. No portion of fees or surcharges assessed and collected pursuant to this section shall be used for any purpose if such use, under federal law, would preclude the collection of such fee or surcharge.

11. Each owner or operator of a major facility or vessel subject to the provisions of this article shall designate a person in the state as his legal agent for service of process under this section and such designation shall be filed with the secretary of state. In the absence of such designation the secretary of state shall be the designated agent for purposes of service of process under this section.

APPENDIX D

17 N.Y.C.R.R. § 30.10

30.10 Fines and revocation of license. (a) Any licensee which willfully refuses to file a monthly report, or to pay a licensee fee and/or additional fee after a determination by the commissioner, or files a monthly report which is willfully false or willfully fails to keep the records required by this Part, may be subject to a fine, not to exceed two times the annual license fee, as determined by the commissioner.

(b) Any license to operate a major facility may be revoked by the commissioner where the licensee has failed to comply with the terms of the license or any special conditions or requirements contained therein.

(c) The determination of whether a fine should be assessed and the amount thereof, or whether a license should be revoked, shall only be made by the commissioner after a hearing before a hearing officer appointed by the commissioner which is conducted in accordance with the provisions of the State Administrative Procedure Act.